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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 511

ELWOOD C. MARTIN, FRED A. NEMEC, AND ROBERT W. NEMEC, A CO-PARTNERSHIP D/B/A NEMEC COMBUSTION ENGINEERS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 238-245) is reported at 207 F. 2d 655. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 11-31, 37-41) are reported at 100 NLRB 1118.

JURISDICTION

The decree of the court below (R. 246-251) was entered on December 4, 1953. The petition for a writ of certiorari was filed on December 28, 1953.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix to the petition, pp. 1-3.

QUESTIONS PRESENTED

1. Whether a charge averring that petitioners had discharged two employees because they "were engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" adequately supports, under the limitations proviso to Section 10(b) of the Act, the complaint issued by the Board's General Counsel alleging that petitioners discharged the two employees because they engaged in "concerted activities with other employees for purposes of collective bargaining and other mutual aid or protection," where the Board finds that one employee was discharged for Union activity and the other for concerted activity for mutual aid or protection, within the meaning of the Act, but unconnected with the particular Union's activity.

2. Whether substantial evidence on the record considered as a whole supports the Board's findings that petitioners discharged two employees in violation of Section 8(a)(1) and (3) of the Act.[1]

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[1] Petitioners pose a third question relating to an alleged deprivation of a "fair trial." Petitioners do not further explain the basis for this question. In any event, it does not appear to present any issue of importance warranting further review.

STATEMENT

A. *The Board's findings of unfair labor practices*—On February 1, 1951, the International Union, United Automobile Workers, A.F.L., hereafter called the Union, filed a charge averring, in relevant part, that petitioners in violation of Section 8(a)(1) and (3) of the Act had discharged employees Thomas Frederick and Clarence Leeper on or about December 28, 1950, "upon the grounds that these employees were engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" (R. 2). Thereafter, on November 14, 1951, the General Counsel of the Board issued, on the basis of the charge, a complaint alleging, in relevant part, that petitioners in violation of Section 8(a)(3) and (1) discharged Frederick and Leeper on or about December 27 and 28, 1950, "for the reason that they engaged in concerted activities with other employees for the purposes of collective bargaining and other mutual aid or protection" (R. 5-6). In their answer, petitioners denied these allegations and averred that Frederick had been discharged for cause and Leeper had voluntarily quit (R. 7-11).

Upon the evidence adduced at the hearing on the complaint the Board found as follows:

(a) *The discharge of Thomas Frederick*—Except for brief economic layoffs, Frederick worked continuously for petitioners from 1946 until his discharge on December 28, 1950, in various capacities including machining axles, machining carbon in-

sert[s], and setting up and repairing machines (R. 15-16; 87-89, 157, 170, 192-194-195). In October 1950, when the Union began to organize the plant employees, Frederick served as its one-man organizing committee (R. 13-14; 51-53, 89-91, 97-98). On December 27 and 28, Frederick, with the aid of one or two others, distributed about 100 union authorization cards among the employees (R. 16; 55-56, 90, 102-103, 104) and obtained signed cards from 55 employees representing about half of the work force, (*ibid.*).

When Foreman Gilly came upon Frederick in the act of soliciting employees to sign the union cards, Frederick facetiously suggested that Foreman Gilly himself sign a union card (R. 16; 90-91, 104-105, 119-120). Foreman Gilly made no comment, but at the close of the shift handed Frederick his pay check and said he was discharged because petitioner Fred Nemec, a partner in the firm, had complained about Frederick's laxity in keeping his machine clean (R. 16, 17; 92, 106-107). Frederick protested, "You know that isn't right, Ed," explained that his job of setting up and repairing the machines did not, unlike that of the operator, include the task of cleaning the machines, and suggested that he was really being discharged because of his organizational activities among the employees (R. 16; 92-93, 107, 178). Gilly replied only, "All I know is what the old man told me" (R. 16; 92-93, 107).

Although Frederick was told, at the time of his discharge, that the reason for his discharge was because Nemec had complained about Frederick's

failure to clean his machine, Nemec himself denied he had been consulted about Frederick's discharge (R. 20; 159). Both Nemec and Gilly admitted that the last complaint to Frederick about this matter was made at least two years prior to his discharge (R. 20-21; 165-166, 182-183). Moreover, Gilly also admitted that it was the operator's job, not that of the maintenance man, to clean the machine (R. 183). At the hearing, petitioners asserted for the first time that Frederick was discharged because he was a poor workman and insubordinate during the last month of his employment (R. 16; 172-177; 184, 199).

The Board rejected petitioners' explanation for Frederick's discharge as mere pretexts and, upon the entire record, concluded that petitioners had discharged Frederick because of his Union activity, thereby violating Section 8(a)(3) and (1) of the Act (R. 39).

(b) *The discharge of Clarence Leeper*—Leeper, a welder of 22 years' experience, worked on the night shift in petitioners' welding shop from October until December 28, 1950, when he was discharged (R. 12, 20; 64, 125).[2]

During the night shift of December 27, Leeper and the 14 other welders of the shop assembled in one of the welding booths where they spoke to Night Superintendent Milliron about securing a night bonus and a paid lunch period (R. 14; 57-58). At their request, Milliron called in petitioner

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[2] Leeper died six months later, before the hearing was held in the instant case (R. 12; 134).

Nemec, telling him "there [is] a work stoppage in the welding shop and Mr. Leeper [has] all the welders in an uproar" (R. 14; 152). When Nemec arrived, Leeper, on behalf of his fellow employees (R. 60, 69, 148), told Nemec that the men wanted a night shift bonus and a paid lunch period, and declared: "We want a showdown on this lunch hour pay. . . . If we don't get it, we are going to walk out" (R. 14; 70, 153). Nemec replied that he would look into the matter (R. 14; 60, 70, 145, 153). Leeper then stated that if their demands were not met he was "quitting" (R. 14; 60, 70, 153). One employee thereupon intervened, saying "I hope you don't mind if we don't strike along with you" (R. 153). Another announced that "[s]o far as I am concerned, you can give me mine now" (R. 14; 60-61, 152), whereupon Nemec answered, "Well just go on to the office. We don't want any hot-headed characters around here" (R. 60-61). Leeper concluded the meeting by giving Nemec 24 hours in which to reach a decision (R. 14-15; 60, 70, 154).

After Nemec left the department, Leeper said to another welder, "When we check in . . . [W]e will come in at 4:30 and get our hoods and march out in front of the machine shop so they can see us" (R. 146). Leeper then went back to work for the remainder of the shift (R. 15; 61, 146). On leaving the plant he did not, as was customary for employees leaving permanently, take his tools with him R. 20; 66, 126-127).

The following afternoon, December 28, Leeper left home at the usual hour, before 4 p.m., taking

his lunch along (R. 15; 126). Shortly thereafter, Nemec came to the house looking for Leeper but was told by Leeper's wife that Leeper had already left for work (R. 15; 125-126, 137, 155). When Nemec handed her Leeper's paycheck to date and said that Leeper had quit, Mrs. Leeper expressed surprise (R. 155-156). Nemec then explained, "Well, he has given us an ultimatum of several things he wants and we can't meet his demands. Therefore we are letting him quit" (R. 155-156). Nemec declared that he "hated to see [Leeper] go" but Leeper had gotten the welding shop in an uproar and "we couldn't be pushed around like that. . . . But due to the trouble he had stirred up in the welding shop we couldn't put him back" (R. 126, 155, 163-164). Nemec then left taking back with him Leeper's paycheck (R. 126, 130-131).

Meanwhile, Leeper had returned to the plant but he was not allowed to work (R. 15; 61). During the next few days, Leeper made several attempts to return to work, telephoning the plant to find out the reason he was not being permitted to work and offering to waive his demand for retroactive pay (R. 15; 127-129, 162-163). Nemec refused, however, because "things had gone as far as they had. There was so much trouble stirred up it just wouldn't be right" (R. 163). Nemec did, however, accede to Leeper's request for 4 hours call-in pay for December 28, the day following the meeting in the welding shop (R. 20; 132-133, 159-160).

The Board, on the basis of the evidence summarized above, rejected petitioners' claim that Leeper

had quit and concluded that he had been discharged because of his role in presenting the welders' demands for increased compensation; that this incident constituted concerted activity protected by Section 7 of the Act; and that, therefore, his discharge for engaging in such activity constituted a violation of both Section 8(a)(1) and 8(a)(3) (R. 20, 38).

B. *The Board's order.*—The Board's order (R. 39-41), in conventional form, requires petitioners to cease and desist from the unfair labor practices found; to offer immediate reinstatement to Frederick and compensate him for loss of pay caused by the discrimination against him; to make whole the estate of Leeper for loss of pay suffered; and to post appropriate notices of compliance with the order.

C. *The decision of the court below.*—The court below concluded (R. 241-245) that the Board's unfair labor practice findings, summarized above, were supported by substantial evidence and enforced the Board's order in full.[3] The court also rejected (R. 239-241) petitioners' contention that the charge filed against petitioners which averred that the two employees had been discharged for "engaging in union organizational activities [and] for the purpose of discouraging the formation of the Union" was at variance with the allegations of the complaint that they were discharged "for the

[3] The court below (R. 245, n. 3), upholding the Board's finding that Leeper's discharge was violative of Section 8(a)(1) of the Act, deemed it unnecessary to determine whether, as the Board further found (*supra*), his discharge was also violative of Section 8(a)(3).

reason that they engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid or protection," and that the complaint was not therefore supported by a timely and appropriate charge, with the result that under the six month limitation proviso contained in Section 10(b) the proceedings before the Board were invalid. The court stated (R. 239, 241):

> [The] charge and complaint alike identified the allegedly illegal transaction by giving the names of the individuals concerned and the date of their dismissal. The difference between them is one of detail as regards the description of the activity engaged in.
>
> * * * * *
>
> We conclude that the charge in the case before us supplied an adequate foundation for the complaint and that petitioners suffered no prejudice in consequence of such variation as existed.

ARGUMENT

1. Petitioners' contention (Pet. 7-9, 13-16) that because of the "variance" between the charge and the complaint, the complaint was not adequately supported by an appropriate timely charge and hence the proceedings before the Board were barred by the limitations proviso of Section 10(b), presents no question warranting review by this Court. With respect to Frederick, who was discharged because of his union activity, the claim of variance is wholly without foundation. Obviously, there is no material variance between the averment

of the charge that he was discharged for union organizational activities and the allegation of the complaint that he was discharged for engaging in concerted activities with other employees for purposes of collective bargaining; either averment fits Frederick's case exactly. With respect to Leeper, who was discharged for his role in presenting the welders' demand for increased compensation, the charge and the complaint, as the court below observed (R. 239), adequately identified the allegedly illegal action on petitioners' part and "[the] difference between them is one of detail as regards the description of the activity engaged in." In this posture, the claim of variance, particularly in view of the further fact, noted by the court below (R. 241), that petitioners have made no showing of prejudice, is both hypertechnical and inconsequential. Cf. *Cusano* v. *National Labor Relations Board,* 190 F. 2d 898, 903-904 (C.A. 3); *National Labor Relations Board* v. *Westex Boot & Shoe Co.,* 190 F. 2d 12, 13 (C.A. 5); *Kansas Milling Co.* v. *National Labor Relations Board,* 185 F. 2d 413, 415 (C.A. 10). The Court of Appeals for the Fourth Circuit, as petitioners point out, has apparently expressed a contrary view in *Joanna Cotton Mills* v. *National Labor Relations Board,* 176 F. 2d 749, 754, but the view thus expressed was, as the Fourth Circuit stated, only an alternative ground for its decision in the case and there is therefore no real conflict between the controlling grounds of decision in the two cases. Moreover, the *Joanna* case may be distinguished from the instant case. There,

in the Fourth Circuit's view, the amended charge, which was filed more than six months after the unfair labor practice charged, was "expressly filed as a substitute" for the original charge (176 F. 2d at p. 754), so that, with the original charge having been thus superseded, there was no timely charge to support the complaint. No such substitution was made here and the complaint rests upon a charge filed within six months of the unfair labor practice. Finally, as the court below also stated, the dictum in *Joanna* has not been followed in other circuits in comparable cases. Cf., in addition to cases cited above, *National Labor Relations Board* v. *Dinion Coil Co.*, 201 F. 2d 484, 491 (C.A. 2); *National Labor Relations Board* v. *Pecheur Lozenge Co.*, 33 LRRM 2324, 2330 (C.A. 2, decided December 31, 1953); *National Labor Relations Board* v. *Kobritz*, 193 F. 2d 8, 14-16; *Stokely Foods, Inc.* v. *National Labor Relations Board*, 193 F. 2d 736, 737-738 (C.A. 5); *National Labor Relations Board* v. *Bradley Washfountain Co.*, 192 F. 2d 144, 149 (C.A. 7).

2. Petitioners' challenge (Pet. 10-12, 17-18) to the adequacy of the evidence supporting the Board's findings also presents no question warranting review by this Court. The court below, correctly we think, concluded (R. 241) that "the inference drawn by the examiner and the Board as respects the motivating cause [of Frederick's and Leeper's discharge] are warranted by the evidence." This Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find

the record was tilting one way rather than the other, though fair-minded judges could find it tilting either way." *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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